

**Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.**

DATE: December 4, 1997
CASE NO: 96-INA-376

In the Matter of:

ROYAL SPICE, INC.
Employer

On Behalf of:

MOHAMMAD HOSSEIN DADGOSTAR
Alien

Appearance: John L. Minella
Los Angeles, CA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212(a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,¹ and any written argument of the parties. § 656.27 (c).

Statement of the Case

On March 15, 1992, Royal Spice, Inc. ("employer") filed an application for labor certification on behalf of Mohammad Nasir Raissi Ardali. The CO approved the employer's application but for unknown reasons, Mr. Ardali did not pursue his immigration. On August 14, 1995, Royal Spice, Inc. ("employer") filed the same application, this time substituting Mohammad Hossein Dadgostar ("alien") for the original alien to fill the position of Vice President, Sales at a weekly wage of \$685.00 (AF 31). The job duties are described as follows:

Coordinate all aspects of sales department, implementing & executing corporate policies. Set sales goals for company in close coordination with marketing department. Meet with & report to Board of Directors periodically. Hire/terminate/promote/evaluate department staff. Determine sales forecasts & new techniques for increasing sales. Participate in industry shows, pushing products. Work closely with suppliers to determine lowest sales prices for customers. Follow activities of competitors & take appropriate steps to minimize their impact on our sales. Meet with customers as necessary. Analyze lost sales to determine repetition.

The job requirements are a Bachelor's degree in any field of study and four years of experience in the job offered.

On October 4, 1995, the CO issued a Notice of Findings proposing to deny the second application. The CO stated that the only change permitted in the application in which the alien was substituted is that of the alien's name and address. Since the new application amended other items in the labor certification, the CO denied certification.

In rebuttal dated November 17, 1995, the employer acknowledged that the new application did not exactly duplicate the older one. The employer stated that it amended Items 5 and 6 in order to reflect a new business address and telephone number. The employer pointed out that under 28 U.S.C. § 1746, all declarations made on labor certification applications are made under penalty of perjury. Thus, under the advice of counsel, the employer amended this information to avoid perjuring itself (AF 23).

The CO issued the Final Determination on December 7, 1995 denying the labor

¹ All further references to documents contained in the Appeal File will be noted as "AF."

certification. Despite the employer's contention that it would be perjuring itself by submitting an application without updating its business address and phone number, the CO found that labor certification could not be granted because the employer amended items other than the alien's name and address. On January 5, 1996, the claimant requested review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether an alien may be substituted for the original alien where the original labor certification application was granted by the CO?

Section 656.30 (c) (2) formerly provided that "a labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Alien Employment Certification form." *See* 20 C.F.R. § 656.30 (c) (2) (April 1, 1991 Ed.). Accordingly, an employer could freely substitute the original alien with another alien as long as the new alien met the applicable regulatory criteria. However, on October 23, 1991, the Department of Labor amended § 656.30 (c) (2) to provide that "a labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form." Thus, under current law, only the alien named on the original labor certification application may be the beneficiary of a permanent labor certification. Requests for the substitution of an alien received on or after November 22, 1991 will not be processed.² *See* 20 C.F.R. § 656.30 (c) (2); 78 *Employers*, 92-INA-46, 88-104, 107 to 123, 125 to 139, 141 to 147, 149 to 159, 181 to 184, 188, 215, 216, 221, 222, 224, 236 (May 19, 1992) (*en banc*) (*per curiam*).

In this case, the CO certified the original application on March 15, 1992. The employer did not seek the substitution of the original alien until August 10, 1995 at which time it replaced Mr. Raissi Ardali with Mr. Dadgostar. Since the employer did not make this request until well after November 22, 1991, we find that certification was properly denied.

ORDER

² Attached to the employer's appellate brief is the CO's response dated Sept. 5, 1991 to an unidentified employer's request for substitution of aliens. This document, however, possesses no probative value as the names of the employer and the alien have been blacked out to conceal their identities.

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.